THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOSEPH C. McCOMAS, II,
Grievant,

v. **Docket No. 2014-1489-MerED**

MERCER COUNTY BOARD OF EDUCATION
Respondent.

DECISION

Joseph C. McComas, II ("Grievant") submitted this grievance directly to Level Three on April 18, 2014, as authorized by W. Va. Code § 6C-2-4(a)(4), challenging the termination of his employment as a substitute teacher by the Mercer County Board of Education ("Respondent" or "MCBOE"). For relief, Grievant seeks reinstatement "so my name can be cleared and my character restored." Following a continuance for good cause shown, a Level Three hearing on this grievance was held on September 9, 2014, in Beckley, West Virginia. Grievant was represented by Anthony M. Salvatore, Esquire, with Hewitt & Salvatore, PLLC, while Respondent was represented by Kermit J. Moore, Esquire, with Brewster, Morhous, Cameron, Caruth, Moore, Kersey & Stafford, PLLC. At the close of the hearing, the parties agreed to submit findings of fact and conclusions of law. This matter became mature for decision on October 10, 2014, upon receipt of the last of the parties' post-hearing submissions.

Synopsis

Grievant was terminated from his employment as a substitute teacher by Respondent on April 10, 2014, for "continued poor performance" including use of inappropriate language and falling asleep in class. Respondent failed to establish by a

preponderance of the credible evidence of record that Grievant used inappropriate language in a classroom on March 24, 2014, as alleged. Respondent established by a preponderance of the evidence that Grievant continued to sleep in class after previously being suspended for sleeping in class. In these circumstances, Grievant failed to establish that the penalty imposed, termination of his employment contract as a substitute teacher, was inherently disproportionate to the proven offense, or represented an abuse of the school board's discretion. Accordingly, this grievance will be granted, in part, and denied, in part.

The following Findings of Fact are made based upon the record developed at the Level Three hearing.

Findings of Fact

1. Grievant has been employed by the Mercer County Board of Education ("MCBOE") as a substitute teacher for many years, such employment having commenced in 1980. Grievant has also worked as a substitute teacher in Raleigh County. In recent years, Grievant has worked as a substitute for a total of 133 days or more during the school year.

2. Stephen B. Comer is employed by MCBOE as Principal at Glenwood School.

3. Deborah Akers is employed by MCBOE as Superintendent of Schools.

4. On March 24, 2014, Grievant was working as a substitute art teacher at Glenwood.

5. While Principal Comer was performing lunch duty on March 24, 2014, “a couple” of fifth grade students came to him and complained that Grievant had used inappropriate language, in particular the “F-word,” during their previous classroom period in art class.

6. Immediately after hearing the students’ complaint, Principal Comer went to Grievant’s classroom and asked him if he was having any problems. Grievant indicated that he was simply cleaning up after the previous class.

7. Principal Comer advised Grievant that a couple of students had alleged that he used inappropriate language in his classroom. Grievant denied saying anything inappropriate.

8. Principal Comer left the art classroom and went to another classroom where the same students who had been in Grievant’s art class were getting ready to start a math class. Principal Comer advised the students that there had been a complaint that Grievant had used inappropriate language during their art class, without specifying the nature of the language alleged. Principal Comer then instructed all twenty-two (22) students to get out a piece of paper and write on it anything inappropriate they might have heard Grievant say during class. He further instructed the students that if they did not hear Grievant say anything inappropriate, to state that on the paper.

9. Six (6) of the students wrote that they did not hear any inappropriate language. Sixteen (16) students wrote down various statements they recalled Grievant making, including “come the f**k down,” “f*** you b****,” stop that “fu**** stuff,” “stop you

silly “f*****,” “quiet down fu**ers,” “stop that silly sh** fu**er,” “knock that off you f**ker,” “stop that silliness f*****,” “stop doing that you little f***er,” “calm down you little f***ers,” “stop that silliness f***,” “stop making that noise little f***er,” “you in black shirt stop that silly f***ing tapping,” “all I heard is the F word,” and “the teacher yelled the f**k word.” *See* R Ex A.

10. None of the statements were signed. *See* R Ex A. None of the students appeared to testify at Level Three. MCBOE provided no explanation why none of the students were called as witnesses.

11. After reviewing the students’ written statements in his office, Principal Comer met with Grievant after school that day, relating what the students had told him and what they had written. Grievant vigorously denied making any such statement.

12. Principal Comer prepared a Performance Evaluation Report for Substitute Personnel in which he indicated that Grievant did not meet standards for tact and self-control and for carrying out his duties in an ethical manner. *See* R Ex B.

13. Grievant signed the evaluation and added the following comments:

> This is absolutely not true. I never use bad words ever. I don’t know what word a student may have mistaken for an inappropriate word. I asked one boy who was pecking on the table to stop that foolishness. He was also making some noises with his mouth. When I asked him to stop he did.

R Ex B.

14. Several days following the incident on March 24, 2014, the regular art teacher returned to Glenwood. Three or four seventh grade students related Grievant’s actions in the teacher’s absence on March 24, and she sent the students to report their observations to Principal Comer. The students asserted that Grievant had fallen asleep

while sitting at his desk during their art class on March 24, 2014. They further stated that, even after Grievant stood up and leaned against the wall, he fell back to sleep during their class.

15. Principal Comer reported these allegations to Dr. Filipek, MCBOE's Human Resources Director.

16. None of the students who claimed to have observed Grievant sleeping on March 24, 2014, were identified by name, nor did any students testify at the Level Three hearing regarding these events.

17. In early January 2014, Grievant was suspended by MCBOE for falling asleep in class and failing to properly perform his classroom duties. Grievant's suspension was for 30 working days.

18. When Superintendent Akers met with Grievant in December 2013 concerning his proposed suspension, he advised that he had changed his medication and was trying to get it regulated. During that meeting, Superintendent Akers informed Grievant that, due to the nature of his teaching duties, he would need to turn down substitute duties until he was physically able to perform his essential duties, including remaining awake in class.

19. In January 2014, Grievant provided MCBOE with correspondence from his physician, Abdul R. Piracha, M.D., describing certain medications Grievant was taking. Dr. Piracha noted that "one of the side effects of these medications is drowsiness." *See* G Ex 2.

20. Grievant did not request an accommodation for his medical condition, simply making MCBOE aware that his medications caused drowsiness.

21. Grievant received Performance Evaluation Reports from Mercer County Early Learning Center and Princeton Primary in December 2013 in which he received ratings of "Does Not Meet Standard." Each of these evaluations contained narrative comments stating that Grievant had been observed sleeping during the class he was teaching. *See* R Ex C.

22. Three MCBOE employees made written statements stating that they observed Grievant sleeping in class on various occasions during December 2013. *See* R Ex D.

23. After meeting with Grievant on April 2, 2014, Superintendent Akers sent correspondence to Grievant on April 3, 2014, which stated, in pertinent part, as follows:

> This letter is a follow-up to our conference on Wednesday, April 2, 2014. As I stated during our meeting, I will recommend termination of your substitute contract with the Board of Education. The reason for this termination is your continued poor performance as a substitute. The last evaluation conducted by Mr. Comer indicates that you used inappropriate language in the classroom, and fell asleep in class. Although you deny both allegations, 16 of the 22 children in that room confirmed the use of inappropriate language. Additionally, 5 students came to Mr. Comer after that day, and reported that you fell asleep during class. As you know, you were recently suspended for falling asleep in class.
>
> Due to repeated instances of poor performance, I will recommend termination of your substitute contract. A hearing on this matter is scheduled for Thursday, April 10, 2014, at 4:30 PM in the Seminar Center at the Mercer County Technical Education Center . . . .

R Ex E.

24. Carolyn Miller, a retired school teacher, has been friends with Grievant for nineteen years. She has never heard Grievant use the F-word or any other foul language on any occasion. She has observed Grievant interact with her grandchildren on multiple occasions without making any inappropriate comments.

25. Ms. Miller has observed Grievant nod off and fall asleep on multiple occasions in a social setting.

26. Maxine A. Moye is Grievant's aunt. She has known Grievant his entire life and, during his adult life, has been around him two or three times each week. She has never heard Grievant utter any improper or foul language on any occasion. Ms. Moye is a retired elementary school teacher.

27. Grievant admits that he has fallen asleep in class on occasion "due to his medication." Grievant underwent testing following his termination, and was diagnosed with sleep apnea. He was told that he could benefit from the use of a CPAP machine at night. However, he has not followed up to determine if he would beneficially tolerate this treatment. Grievant is now taking the medications which cause drowsiness before he goes to bed at night, reducing the likelihood that the side effects will cause him to fall asleep during the day. Grievant is also taking some different medication.

28. Grievant denied using foul language at any time in any context.

29. MCBOE did not provide Grievant with a corrective action plan and an opportunity to improve his performance before he was terminated.

30. Grievant was also terminated as a substitute teacher by the Raleigh County Board of Education for sleeping on duty on multiple occasions.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily and capriciously. *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). *See Alderman v. Pocahontas County Bd. of Educ*., 223 W. Va. 431, 675 S.E.2d 907 (2009); *Beverlin v.*

Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va. Code § 18A-2-8(a) provides:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

Although MCBOE labeled Grievant's conduct as "continued poor performance," the school board argues in its post-hearing submission that Grievant's alleged use of inappropriate language in the classroom may be labeled as insubordination, and his alleged sleeping in class may be categorized as willful neglect of duty. Because the termination notice Grievant received from Superintendent Akers alleged the specific wrongful conduct, Grievant received reasonable notice of the charges he was required to defend. *See Holley v. Lincoln County Bd. of Educ*., Docket No. 03-22-326 (June 17, 2004).

Certain facts relating to the charges against Grievant were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the

witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

A substantial part of the evidence supporting the charges against Grievant consists of hearsay statements. Relevant hearsay is admissible in administrative hearings. *Holley*, *supra*; *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Sept. 30, 1996). However, an administrative law judge must determine what weight, if any, is to be given to hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ*., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the

absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996). *See generally*, *Borninkhof v. Dep't of Justice*, 5 M.S.P.B. 150 (1981).

In regard to the allegation that Grievant used inappropriate language in a classroom containing fifth grade art students on March 24, 2014, no individual who allegedly heard this language appeared to testify at the Level Three hearing in this matter. Glenwood Principal Stephen B. Comer testified that four students approached him after lunch complaining that Grievant had used the "F-word" during an art class earlier that day. Mr. Comer approached Grievant and asked him about this allegation. Grievant denied making any such statement, noting that he never uses such language.

Mr. Comer then went to another classroom in which the same fifth graders who had been in Grievant's art class were starting a math class with another teacher. Mr. Comer asked the students to write on a sheet of paper whether they heard Grievant using inappropriate language during art class that morning. He further instructed, if they heard any inappropriate language, to write down that language as specifically as they could recall. There were 22 students who turned in unsworn and unsigned written statements. Of the 22 students, 6 reported that they did not hear Grievant say anything inappropriate. The remaining 16 reported hearing "come the f**k down," "f*** you b****," stop that "fu*** stuff," "stop you silly "f*****," "quiet down fu**ers," "stop that silly sh** fu**er," "knock that off you f**ker," "stop that silliness f*****," "stop doing that you

little f***er," "calm down you little f***ers," "stop that silliness f***," "stop making that noise little f***er," "you in black shirt stop that silly f***ing tapping," and "the teacher yelled the f**k word." *See* R Ex A.

Grievant presented character evidence from two credible witnesses, Carolyn R. Miller, a long-time friend, and Maxine A. Moye, an aunt who has known Grievant his entire life. Ms. Miller and Ms. Moye are both retired school teachers, and each of them related that they had never heard Grievant use inappropriate language at any time. Grievant also testified in this matter, denying that he used the "F-word" on the occasion alleged, or on any other occasion. Although Grievant had a motive to lie based upon his personal interest in the outcome of this grievance, Grievant freely admitted on multiple occasions during his testimony that he had fallen asleep in class, substantially as alleged. Grievant's demeanor remained the same whether he was making an admission against interest or denying the allegation relating to inappropriate language. Grievant recalled correcting a student who was tapping on a table with his fingers, but insisted that his comments did not include any inappropriate language.

Unlike Grievant and his character witnesses, the students who alleged that Grievant used inappropriate language were not subject to cross-examination. Further, there was no opportunity to observe their demeanor. Thus, the evidence against Grievant consists of the verbal hearsay statements that four unidentified 10 or 11-year-old students made to Principal Comer, and the 16 written statements submitted by these 4 unidentified students and 12 of their likewise anonymous classmates in response to Principal Comer's request. Although Grievant has been employed by

MCBOE for many years, there was no documentation, or any credible evidence from any other source, indicating that any complaints regarding use of inappropriate language by Grievant had been generated on any other occasion. Grievant was completely credible on this issue, and his testimony was supported by two very credible character witnesses. This credible evidence outweighs the multiple hearsay statements presented by MCBOE. *See Comfort v. Regional Jail & Corr. Facility Auth*., Docket No. 2013-1459-CONS (Apr. 18, 2013); *Holley*, *supra*. Therefore, MCBOE failed to establish by a preponderance of the evidence that Grievant was insubordinate[1] for using inappropriate language in the classroom on March 24, 2014, as alleged.

MCBOE contends that Grievant's falling asleep in class constitutes willful neglect of duty prohibited by W. Va. Code § 18A-2-8. Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ*., Docket No. 89-06-656 (May 23, 1990). In order to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. *Stover v. Mason County Bd. of Educ*., Docket No. 95-26-078 (Sept. 25, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 92-21-427 (Feb. 24, 1994). *See Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990). *See also Fox v. Bd. of Educ*., 160 W. Va. 668, 236 S.E.2d 243 (1977).

[1] Inasmuch as Respondent failed to establish by preponderant evidence that Grievant used the inappropriate language alleged, it is not necessary to consider whether such activity constitutes insubordination prohibited under W. Va. Code § 18A-2-8(a). Likewise, it is not necessary to consider whether such activity involves conduct that is correctable within the purview of West Virginia Department of Education Policy 5310.

The evidence established that Grievant was aware that certain medication he was taking for a medical condition caused drowsiness. In addition, Grievant may have been suffering from sleep apnea during this time period. MCBOE Superintendent Akers informed Grievant that if he had a medical condition, or was taking medication that might cause him to fall asleep in class, he needed to decline any offered substitute assignments until his medications were adjusted, or his condition was being effectively treated, to assure that he could stay awake in class. Certainly, remaining awake to monitor student conduct represents an essential function of a substitute teacher's job under the Americans with Disabilities Act, 42 U.S.C. § 12111, *et seq*. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996); *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991).

It is also significant that Grievant was previously suspended for thirty days, commencing in January 2014, based upon his falling asleep in class, and failing to properly perform his assigned classroom duties. Where Grievant failed to grieve a disciplinary action that was administered on an earlier occasion, the merits of such action are not at issue in a subsequent proceeding. *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997); *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996). Indeed, the information contained in Grievant's prior discipline must be accepted as true. *Aglinsky, supra*. *See Womack v. Dep't of Admin*., Docket No. 93-ADMN-430 (Mar. 30, 1994); *Perdue v. Dep't of Health & Human Res*., Docket No. 93-HHR-050 (Feb. 4, 1994). Consistent with this principle, the basis for Grievant's earlier thirty-day suspension is accepted as true and correct.

See Koblinsky v. Putnam County Health Dep't, Docket No. 2011-1772-CONS (Oct. 23, 2012).

Having been previously suspended for sleeping in class, it should have been crystal clear to Grievant that sleeping in class was improper, and would not be tolerated. Although the Respondent's evidence that Grievant again slept in class after his suspension was derived from hearsay evidence, Grievant's admissions against interest, while under oath at the Level Three hearing, effectively corroborated this allegation. *See Plantz v. W. Va. Dep't of Health & Human Res*., Docket No. 2012-0756-DHHR (Mar. 13, 2013), *aff'd*, Cir. Ct. of Kanawha County No. 13-AA-57 (Sept. 9, 2014); *Holley*, *supra*; *Gunnells*, *supra*. In these circumstances, Grievant's falling asleep in class was established to constitute willful neglect of duty.

When charges relating to a school employee's termination involve incompetency or conduct which is deemed correctable, the school board must comply with the provisions of West Virginia Department of Education Policy 5310, which requires that the employee be informed of his deficiencies and provided a reasonable period to improve. *Mason County Bd. of Educ. v. State Superintendent of Schools*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980); *Snodgrass v. Wetzel County Bd. of Educ*., Docket No. 2009-1691-WetED (Aug. 18, 2010). *See McMann v. Jefferson County Bd. of Educ*., Docket No. 2009-1340-JefED (Oct. 31, 2009); *Maxey v. McDowell County Bd. of Educ*., Docket No. 97-33-208R (Apr. 29, 2005). However, Grievant's conduct in this matter involves a conscious and deliberate decision to accept substitute teaching assignments, knowing that some combination of his medical condition and medication

might cause him to fall asleep in class. Such intentional and irresponsible conduct on repeated occasions by someone entrusted with the care and safety of school children involves behavior that is not correctable within the meaning of Policy 5310. *See Maxey*, *supra*.

Where, as here, the employer proves some, but not all, of the charges against an employee, the Grievance Board must determine whether the penalty imposed, in this case termination of employment, is otherwise supported by the charges which were proven. *See Bailey v. Logan County Bd. of Educ*., Docket No. 93-23-383 (June 23, 1994). Although Grievant was not shown to have used inappropriate language in the classroom, MCBOE did establish that Grievant was sleeping in class. Any allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense, and Grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or that there is an inherent disproportion between the offense and the personnel action. *Holley*, *supra*; *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). See *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989). Because Grievant was previously issued a thirty-day suspension for sleeping in class on multiple occasions, the undersigned Administrative Law Judge is unable to find that the penalty imposed involves an abuse of discretion, or is unreasonably disproportionate to the offense. Therefore, Grievant's termination for willful neglect of duty must be upheld.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Because this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Nicholson v. Logan County Bd. of Educ*., Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ*., Docket No. 89-41-232 (Dec. 14, 1989).

2. An employee of a county board of education may be suspended or dismissed only for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of *nolo contendere* to a felony charge. *See* W. Va. Code § 18A-2-8.

3. The authority of a county board of education to dismiss a teacher under W. Va. Code § 18A-2-8, as amended, must be based upon the just causes listed therein, and must be exercised reasonably, not arbitrarily or capriciously. Syl. pt. 7, *Alderman v. Pocahontas County Bd. of Educ*., 223 W. Va. 431, 675 S.E.2d 907 (2009); Syl. pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975). *See Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

4. An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Hamilton v. W. Va. Dep't of Health & Human Res*., Docket No. 2011-1785-DHHR (Sept. 6, 2012); *Furr v. Dep't of Health & Human Res*., Docket No. 2011-0988-CONS (Dec. 7, 2011); *Kennedy v. Dep't*

of Health & Human Res., Docket No. 2009-1443-DHHR (Mar. 11, 2010). *See Warner v. Dep't of Health & Human Res*., Docket No. 07-HHR-409 (Nov. 18, 2008).

5. The Grievance Board has applied the following factors in assessing hearsay testimony: (1) the availability of persons with first-hand knowledge to testify at the hearings; (2) whether the declarant's out of court statements were in writing, signed, or in affidavit form; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; (6) whether collaboration for these statements can be found in agency records; (7) the absence of contradictory evidence; and (8) the credibility of the declarants when they made their statements. *Simpson v. W. Va. Univ*., Docket No. 2011-1326-WVU (May 3, 2012); *Cale v. W. Va. Univ*., Docket No. 2011-1711-WVU (Mar. 22, 2012); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996). *See generally*, *Borninkhof v. Dep't of Justice*, 5 M.S.P.B. 150 (1981).

6. Hearsay evidence is admissible in the grievance procedure for public employees, but there is no requirement, statutory or otherwise, that it be afforded any particular weight. Generally, written statements, even affidavits, may be discounted or disregarded unless the offering party can provide a valid reason for not presenting the testimony of the persons making them. *Comfort v. Regional Jail & Corr. Facility Auth*., Docket No. 2013-1459-CONS (Apr. 18, 2013). *See Simpson*, *supra*; *Cook v. W. Va. Div. of Corrections*, Docket No. 96-CORR-037 (Oct. 31, 1997).

7. The charge that Grievant used inappropriate language in the classroom was supported only by hearsay testimony and evidence. Grievant's credible testimony, and the corroborating testimony of two credible character witnesses, effectively refuted any inference that Grievant used inappropriate language. Accordingly, this offense was not established by a preponderance of the evidence.

8. Willful neglect of duty "is conduct constituting a knowing and intentional act, rather than a negligent act. *Williams v. Cabell County Bd. of Educ*., Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ*., Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ*., Docket No. 93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996)." *Geho v. Marshall County Bd. of Educ*., Docket No. 2008-1395-MarED (Oct. 30, 2008)(footnote omitted).

9. Respondent established by a preponderance of the evidence that Grievant engaged in willful neglect of duty by falling asleep in a class that he was teaching at Glenwood School on or about March 24, 2014. *See Plantz v. W. Va. Dep't of Health & Human Res*., Docket No. 2012-0756-DHHR (Mar. 13, 2013), *aff'd*, Cir. Ct. of Kanawha County No. 13-AA-57 (Sept. 9, 2014)

10. In the circumstances presented, including Grievant being aware that he was taking medications which included drowsiness as a side effect, his prior suspension for sleeping in class, and that, as a substitute teacher, he was free to turn

down an offered assignment if he was not able to stay awake the entire school day, Grievant's actions in falling asleep in class did not constitute "correctable" conduct within the meaning of West Virginia State Board of Education Policy 5310. *See Maxey v. McDowell County Bd. of Educ*., Docket No. 97-33-208R (Apr. 29, 2005).

11. Any allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and Grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or that there is an inherent disproportion between the offense and the personnel action. *Holley v. Lincoln County Bd. of Educ*., Docket No. 03-22-326 (June 17, 2004); *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995). See *Martin v. W. Va. State Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989).

12. Inasmuch as Grievant previously received a thirty-day suspension for sleeping while serving as a classroom teacher, his termination as a substitute teacher for sleeping in class on another subsequent occasion does not involve an abuse of discretion, or represent a penalty that is unreasonably disproportionate to the offense.

Accordingly, this grievance is **GRANTED**, in part. Respondent Mercer County Board of Education is hereby **ORDERED** to remove any reference to Grievant's use of inappropriate language as grounds for his termination from his personnel records. All other relief is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. V. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: October 24, 2014

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LEWIS G. BREWER
Administrative Law Judge